

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 05-10917 PBS

The HipSaver Company, Inc.,)	
Plaintiff,)	
)	
v)	
J.T Posey Company,)	
Defendant)	
)	
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J.T. Posey Company, Inc.,)	
Counterclaim Plaintiff)	
)	
v)	<u>Oral Argument Requested</u>
)	
The HipSaver Company, Inc. and)	
Edward L. Goodwin,)	
Counterclaim Defendants)	
)	
)	
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MOTION TO DISMISS “CONTINGENT” COUNTERCLAIM

The Counterclaim Defendants (“HipSaver” and “Mr. Goodwin”) move to dismiss the “contingent” Counterclaim. In support of this Motion, HipSaver and Mr. Goodwin state the following:

1. The sole basis for the “contingent” Counterclaim against HipSaver is that it has made false accusations and has engaged in false advertising claims and comparisons on its website. Without exception, the alleged false accusations and false advertising claims and comparisons were made, if at all, prior to the general release of claims executed by the Posey Company on September 22, 2004.

2. This year’s Counterclaim is a virtual lift from and restatement of the allegations made in Posey’s 2004 Counterclaim. Compare paragraph 41 in the current Counterclaim to paragraph 52 in the 2004 Counterclaim, paragraph 42 in the current Counterclaim to paragraph 53 in the 2004 Counterclaim, paragraph 43 in the current Counterclaim to paragraph 54 in the 2004 Counterclaim, paragraph 46 in the current Counterclaim to paragraph 55 in the 2004 Counterclaim, paragraph 46A in the current Counterclaim to paragraph 56A and B in the 2004 Counterclaim, paragraph 46B in the current Counterclaim to paragraph 56C in the 2004 Counterclaim, paragraph 46C in the current Counterclaim to paragraph 56E in the 2004 Counterclaim, paragraph 46D in the current Counterclaim to paragraph 56F in the 2004 Counterclaim, paragraph 46E in the current Counterclaim to paragraph 56G in the 2004 Counterclaim, paragraph 46F in the current Counterclaim to paragraph 56H in the 2004 Counterclaim, paragraph 46G in the current Counterclaim to paragraph 56I in the 2004 Counterclaim, and paragraph 46H in the current Counterclaim to paragraph 56F in the 2004 Counterclaim.

3. HipSaver has not made any new statement and has not modified any statement, claim, or graphic on its website since the date of the 2004 settlement. *See* Mr. Goodwin's Declaration, attached at Tab A. Consequently, the "contingent" Counterclaim, which raises precisely the same allegations as last year, is barred by the release and by this court's dismissal of last year's Posey Counterclaim with prejudice. The release extends also, by its express terms, to HipSaver's officers, directors, and employees, including Mr. Goodwin who is an officer.

4. The general release of all claims and the dismissal with prejudice are a complete bar to this court's exercise of subject matter jurisdiction.

5. In an effort to harass, delay, distract, and cause needless expense, Posey has attempted also to name Mr. Goodwin as an individual Defendant in its Counterclaim. This individual claim is, of course, barred by the release. Further, it is barred as a matter of law because the individual Counterclaim cannot stand on the basis of a piercing of the corporate veil. Massachusetts law permits a piercing of the corporate veil only when the corporate form has been employed to prosecute fraud or egregious injury. No such claim has been made here, and none exists.

THEREFORE, the trial court should dismiss the "contingent" Counterclaim for lack of subject matter jurisdiction and for failure to state an individual claim for relief.

Respectfully submitted,
THE HIPSAVER COMPANY, INC.
By its Attorneys,

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Dated: 8.9.05

CERTIFICATE OF SERVICE

I certify that a copy of this document has been forwarded by electronic mail and USPS First Class mail today to Defendant's counsel of record, Anthony J. Fitzpatrick, Esq., DUANE MORRIS LLP, 470 Atlantic Avenue, Boston, Massachusetts 02210, ajfitzpatrick@duanemorris.com, and by electronic mail and USPS First Class mail to Jeffrey G. Sheldon, Esq., jgsheldon@usip.com and Douglas H. Morseburg, Esq., doug@usip.com, SHELDON & MAK, 225 South Lake Avenue, Pasadena, California 91101.

/s/ Edward J. Dailey
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